Supreme Court of the United States

October Term, 1908

No. 848

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, ET AL.

In Error to the Supreme Court of the Territory of Hawaii.

Supplemental Brief for Plaintiff in Error.

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Attorneys for Plaintiff in Error.

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On Motion to Dismiss or Affirm.

The sole object of the petition (Rec. pp. 2, 4) was for a writ of prohibition.

The decree of the Supreme Court of the Territory of Hawaii (Rec. p. 31), to which this writ of error was sued out, dismissed the temporary writ which had been issued and denied the petition for the permanent writ of prohibition. That decree was manifestly final.

The petition for the writ of prohibition was based upon averments that Judge Gear had taken jurisdiction of the

cause (for the removal of the guardian), under and by virtue of certain statutes of the Territory; that said statutes and each of them and all statutes of the Territory purporting to confer judicial power and authority upon circuit judges at chambers to hear and determine judicial matters, not incident or ancillary to any cause pending in some court, are and each of them is null and void, being in conflict with Article III, section 1, of the Constitution of the United States, providing that:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish;"

and (sec. 8, R. 3), are also in conflict with section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30, 1900, viz:

> "Section 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish."

Section 86 of this same organic act of the Territory provides that "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

That a Federal question was involved and this court has jurisdiction, see—

> Equitable Life Ins. Co. *vs.* Brown, 187 U. S. 308.
> Hawaii *vs.* Mankichi, 190 U. S. 197, 215.

The case for the removal of the guardian, instituted in July, 1904 (Rec. pp. 5, 13), was not a proceeding then

pending within the exception of the organic act of 1900 that, "other proceedings then pending in the courts of the republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii." The guardian had been appointed in September, 1899, and no proceeding was pending in 1900 to be carried on to final judgment and execution.

In the first place, the matter of the guardianship was pending only in the sense that the guardian filed his annual accounts each year. These proceedings for the removal of the guardian are a new and distinct matter, and the first paper therein was filed June 7, 1904.

Second. The matter is no longer in probate. The circuit judges, at chambers, have a general grant of jurisdiction under the statute and no distinction is drawn between equity and probate, although those headings frequently appear in the papers. Under chapter 29 of the Civil Code of 1859 (quoted in our brief, p. 11), the word probate was used and therefore the matter of guardianship is claimed to be pending in probate at the time the organic act went into effect. But act 16 of the laws of 1903 (also in our brief, p. 25, sec. 6, p. 26) went through this chapter and carefully struck out the words "probate" and "court" wherever they occurred, thereby leaving the jurisdiction, if valid at all, where it would be at common law; that is to say, in chancery or equity.

That jurisdiction over guardians and wards is a chancery jurisdiction, see—

Eyre *vs.* Shaftesbury, 2 P. Wms. 103, 119.
2 Eq. Cas. ab. 754.
9 Ency. Pl. & Pr. 891.

It is manifest that in the case below for the removal of the guardian there was no plain, speedy, and adequate remedy by appeal. The jurisdiction of the judge to enter upon a long, expensive, and tedious investigation was de-

nied, and the proper remedy was to seek prohibition from the superior court.

We submit that no argument is required to show that under R. S., sec. 709, a final judgment in the case sought to be prohibited is essential or necessary before the writ of prohibition will issue. Otherwise, in many cases, the mischief would be done which it is the object of the writ to prevent.

Respectfully submitted.

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